STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition Report and Order; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*

Today, I am pleased to support a five-year extension of the Commission's program access rules, specifically the prohibition on exclusive contracts between vertically-integrated satellite cable or broadcast programmers and cable operators. These rules continue to be necessary to not only promote competition and diversity in the distribution of video programming, but to also encourage further investment in the deployment of broadband and other advanced services. Extending the program access rules truly promotes the twin goals of enhanced cable competition and accelerated broadband deployment.

As it turns out, video programming is a killer application that is driving broadband and indeed the entire communications industry. Almost 86 percent of U.S. households get their video programming from a multi-channel video programming distributor (MVPD). Competitive access to video programming, therefore, serves as an important incentive to entrepreneurs, from small businesses to major companies like Verizon, AT&T and Qwest, to enter the video delivery market, make substantial investments to upgrade their networks, and provide consumers with competitive video, voice and data bundled service offerings.

According to the Coalition for Competitive Access to Content, a leading group of competitive video providers, trade associations and consumer groups, video revenues represent between 35 and 55 percent of the total broadband networks revenues. Simply put, "video revenues are essential for the economic success of capital investment" in broadband networks.

I have always supported legally permissible, sustainable means to promote video competition and broadband deployment. Today's decision does just that. It ensures that some, though not all, cable programming will be available to competitive video providers on fair and non-discriminatory terms and conditions. It preserves the program access regime's recognition that product differentiation is a legitimate competitive tool, but the withholding of highly sought programming by a dominant provider leads to barriers of entry that harm competition, the industry and consumers.

As our most recent *Video Competition Report* shows, competition in video distribution and programming markets has intensified, and with the entry of local exchange carriers and other broadband providers, competition in certain areas will truly be robust. According to our *Report,* from 2001 to 2005, the number of cable subscribers, as a share of total MVPD subscribers, has decreased from 77 percent to 69 percent.

Commensurately, DBS subscribership has increased from 18 percent to 27 percent. While the competitive presence of DBS has reduced cable's dominance, concentration remains a concern: the top four MVPDs serve 63 percent of all MVPD subscribers, up five percent from 2004. Program access and vertical integration remain major areas of concern.

The *Order* and *Further Notice* address these concerns by extending our program access rules and seeking comment on whether DBS should be subject to the program access rules. While the only vertically-integrated DBS provider currently complies with our access rules pursuant to a merger condition,[1] we should examine whether the rules should apply, especially since our program access regime applies to cable and common carriers.

I believe that video distribution and the resultant revenue stream will continue to drive broadband deployment, which can benefit consumers and the free flow of information beyond the video marketplace. Consumers will benefit not only from more choices, better service and lower prices, but consumers also stand to gain from a more robust exchange in the marketplace of ideas.

I have long expressed grave concerns about the negative effects of media consolidation in this country, and have focused on the problems raised by growing vertical integration of programming and distribution. Vast new distribution networks promise to limit the ability of any vertically integrated conglomerates from imposing an economic, cultural or political agenda on the public with few alternative choices. I truly believe the benefits of video competition extend beyond the many typical advantages of competition that accrue to consumers, and can actually improve the health of our overall democracy.

One note of concern about this *Order* is the curious turn it takes in revising the discovery process. The Commission decides here it is unreasonable for a respondent not to produce on request all the relevant documents requested by the complainant without a clear discovery standard and a meaningful mediation process. The modification to our existing rules is surprising because, to date, there has not been a single instance where the Commission has requested documents that a party has refused to produce.

The *Order* provides no articulated basis in law, administrative policy or practice to justify such a radical change in Commission policy. The problem with the production of documents has not been a failure of our procedural rules; rather, it has been a failure of will – the Commission's will. It has taken the Commission, on average, seven months to resolve on the merits three out of the 13 complaints filed since December 1998 that the parties did not settle.

[1] Within the context of the pending Liberty Media/DIRECTV transaction, the applicants have expressed a willingness to continue compliance, pursuant to merger conditions in the *News/Hughes Memorandum Opinion and Order*. *See In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004).

The persistent failure of this Commission to act on program access complaints and to request documents in a diligent manner will not be remedied by opening the floodgates to unfettered discovery. Nor will it lead to prompt resolution of access complaints. Indeed, this novel discovery scheme will inevitably frustrate the process and create inefficiency. While I certainly support improving the discovery process to expedite access to relevant documents, the *Order* goes further than warranted by the record in this proceeding.

In sum, the extension of our program access regime is urgently needed to facilitate emerging video competition. I am pleased we are doing so before the current regime expires, and thank my colleagues for working to make many needed improvements in this *Order*.